

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DAVID S. TAWIL</b>	:	SMALL CLAIMS DETERMINATION DTA NO. 820166
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Period January 1, 2000 through June 30, 2001.	:	

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Petitioner, David S. Tawil, 1105 East Eighth Street, Brooklyn, New York 11230, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the period January 1, 2000 through June 30, 2001.

A small claims hearing was held before Arthur S. Bray, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on August 3, 2005 at 10:45 A.M., with all briefs due by September 21, 2005, which date commenced the three-month period for the issuance of this determination. Petitioner appeared by Knapel and Weiss (Richard T. Stamler, CPA). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael H. Hicks and Mitchell H. Rosen).

***ISSUE***

Whether petitioner is liable for the penalty asserted against him pursuant to Tax Law § 685(g) with respect to New York State withholding taxes due from Grappa Design Corp.

***FINDINGS OF FACT***

1. On March 18, 2004, the Division of Taxation (“Division”) issued to petitioner, David S. Tawil, six notices of deficiency asserting a deficiency of withholding taxes as follows:

Notice Number	Period Ended	Amount Due
L-023593256-1	June 30, 2001	\$1,251.12
L-023593257-9	March 31, 2001	\$1,392.29
L-023593258-8	December 31, 2000	\$1,491.11
L-023593259-7	September 30, 2000	\$1,591.13
L-023593260-7	June 30, 2000	\$1,210.96
L-023593261-6	March 31, 2000	\$1,079.91

Each of the notices explained that the records of the Division indicated that petitioner was an officer or responsible person of Grappa Design Corp. (“Grappa”) and that, as a result, he was liable for a penalty equal to the amount of the withholding tax not paid by the business.

2. In order to determine who was a responsible officer of Grappa, the Division examined Grappa’s quarterly withholding tax returns dated January 4, 2000 and January 30, 2001 and ascertained that they were signed by an individual named David Tawil. David Tawil’s title was listed as vice president on the return dated January 4, 2000 and as president on the return dated January 30, 2001.

3. A tax compliance agent went to the premises of Grappa, which was located at 10 West 33<sup>rd</sup> Street, Room 606, New York, New York and found that Grappa had ceased operating. On the basis of the returns which bore petitioner’s name, the taxes were asserted to be due from petitioner.

4. After the notices were issued, the Division acquired access to a database known as “e-MPIRE” which contains information on file with the Secretary of State. According to

incorporation papers which were filed in the office of the Secretary of State on April 21, 1999, the address of Grappa was c/o Horizon, 10 West 33<sup>rd</sup> Street, Room 606, New York, NY 10001-3306.

5. Horizon Exports LLC (“Horizon Exports”) is a limited liability company which exported fabrics. It was organized as a partnership by three brothers, including petitioner, David Tawil. It adopted its current form of business organization in 1997. Each of the partners of Horizon Exports received a form K-1 and a form W-2. In 1997 Horizon Exports was located at 21 West 38<sup>th</sup> Street in New York City, and approximately two years before the date of the hearing, it moved to its current address which is 57 West 38<sup>th</sup> Street in New York City. Horizon Exports was never located at 10 West 33<sup>rd</sup> Street and never had an association with Grappa.

6. At the hearing, petitioner’s representative offered copies of petitioner’s passport and driver’s license to establish the appearance of petitioner’s signature. The signatures on the passport and driver’s license are similar to each other and also similar to the signature on petitioner’s New York State personal income tax return for the year 2002. However, it is readily evident that petitioner’s signature as it appears on the passport, driver’s license and income tax return and the signature of the individual who signed the withholding tax returns are completely different.

7. At one juncture, petitioner made preparations to purchase a house. In the process a title company located a number of judgments against another individual named David Tawil who was located in New York City.

### ***SUMMARY OF THE PARTIES' POSITIONS***

8. Petitioner's representative maintains that the Division issued the notices of deficiency to the wrong David Tawil. According to petitioner's representative, neither petitioner nor Horizon Export ever had any association with Grappa.

9. The Division explained that it issued the notices because petitioner's name appears on the withholding tax returns. The Division also believes that there is a connection between petitioner and Grappa Design through the corporation known as Horizon. In this regard, an agent who was originally assigned to this matter told one of the witnesses that she called Mr. Tawil and he stated that he was not an officer, that he just kept the books for Horizon and that, for a while, Grappa Design was a subsidiary of Horizon. Later, during the summation, the same witness stated that this agent went to Horizon Export on West 38<sup>th</sup> Street and spoke to Mr. Tawil.

### ***CONCLUSIONS OF LAW***

A. The question presented in this proceeding is whether petitioner was a person under a duty to collect, truthfully account for and pay over the taxes withheld from the wages paid by Grappa Design Corp. and therefore liable for a penalty equal to the amount of the unpaid taxes (Tax Law § 685[g], [n]). The resolution of this question depends on whether the individual had or could have had sufficient authority or control over the affairs of the corporation to be considered a responsible officer (*see, e.g., Matter of O'Reilly*, Tax Appeals Tribunal, May 17, 2004).

B. Before reviewing the documentary evidence in this matter, it would be useful to discuss the weight to be accorded the testimony offered by the respective parties. Petitioner's representative and his firm prepared petitioner's and Horizon Export's tax returns. This position made petitioner's representative familiar with the nature of Horizon Export's business and

petitioner's participation therein. Under the circumstances, petitioner's representative was in a position to testify from first-hand knowledge. This position coupled with a credible demeanor warrants according substantial weight to the testimony of petitioner's representative.

Unfortunately, the agent originally assigned to this case was not present at the hearing. Therefore, the testimony offered by the Division regarding this agent's conversations with others was, at best, double hearsay. The original agent may have had a conversation with a Mr. Tawil. However, in her absence, it is not possible to determine whether the person she spoke to was the same Mr. Tawil who is the petitioner in this matter. This point is critical because petitioner's representative contends that the Division issued the notices of deficiency to the wrong David Tawil and that petitioner did not have any involvement whatsoever with Grappa Design Corp.

C. The weight of the documentary evidence clearly supports petitioner's position. Unquestionably, the name David Tawil appears on the withholding tax returns filed during the period in issue. It is also acknowledged that there is a degree of similarity in names between the entity which petitioner is associated with (Horizon Export LLC) and the parent firm of Grappa Design (Horizon). However, juxtaposed with the inference which may be drawn from these two facts, i.e., that petitioner bears responsibility, one must balance numerous factors which support an opposing conclusion. First, the signatures on the withholding tax returns do not bear any resemblance to petitioner's signature which appears on a driver's license, passport and New York State personal income tax return. Second, the finding by the title company that there were a number of judgment liens against a different David Tawil shows that there is more than one person with the same name who resided in the New York City area. Third, the purportedly related company, Horizon, has a different name than the company which petitioner was involved with, i.e., Horizon Export LLC. Horizon was located on West 33<sup>rd</sup> Street while Horizon Export

was located on West 38<sup>th</sup> Street in New York City. It is concluded from the forgoing that Horizon and Horizon Export LLC were different businesses and that petitioner was not involved with Grappa Design Corp. Therefore, petitioner has sustained his burden of proof of establishing that he is not liable for the penalty asserted against him pursuant to Tax Law § 685(g) with respect to the withholding taxes due from Grappa Design Corp.

D. The petition of David Tawil is granted and the notices of deficiency, dated March 18, 2004, are cancelled.

DATED: Troy, New York  
October 27, 2005

/s/ Arthur S. Bray  
PRESIDING OFFICER